BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Game Show Network, LLC,	)	MB Docket No. 12-122
Complainant	)	File No. CSR-8529-P
v.	)	
Cablevision Systems Corp.,	)	
Defendant	)	

TO: Chief Administrative Law Judge Richard L. Sippel

DEFENDANT CABLEVISION SYSTEMS CORP.'S OPPOSITION TO MOTION OF GAME SHOW NETWORK, LLC TO COMPEL DATE CERTAIN FOR THE DEPOSITION OF JOSH SAPAN

Defendant Cablevision Systems Corp. ("Cablevision") respectfully requests that the Presiding Judge deny Game Show Network, LLC's ("GSN") motion to compel the deposition of Josh Sapan, the Chief Executive Officer of AMC Networks Inc. ("AMC"). GSN seeks to elicit testimony from Mr. Sapan—who is not listed on either party's trial witness list—that has nothing to do with the limited supplemental discovery the Presiding Judge approved in the wake of the D.C. Circuit's decision in *Comcast Cable Commc'ns, LLC v. FCC* (the "*Tennis Channel*" decision).[1] There is no evidence that Mr. Sapan played any role in Cablevision's business analysis in 2010 of whether to re-tier GSN. Moreover, Mr. Sapan is an "apex" witness with no unique knowledge of the facts underlying this dispute—facts GSN has explored at length with other witnesses who

[1] 717 F.3d 982 (D.C. Cir. 2013).

have been deposed and will testify at trial. GSN can offer no credible reason to depose Mr. Sapan at this late date, and should be foreclosed from doing so.

BACKGROUND

Mr. Sapan is currently the President and CEO of AMC. At the time of GSN's re-tiering, he was the President and CEO of AMC's predecessor, Rainbow Media Holdings ("Rainbow"), which was then a wholly-owned subsidiary of defendant Cablevision. Rainbow was (and AMC now is) the owner of WE tv, and was the owner of Wedding Central before it was shut down in June 2011.

In his role at Rainbow as the head of a network content business—to be distinguished from Cablevision's "cable" side of the business that brings channels into subscribers' homes—Mr. Sapan had no role in Cablevision's decision to move GSN to the Sports and Entertainment Tier ("S&E Tier"). Cablevision's then-President, John Bickham, and then-Senior Vice President of Programming, Tom Montemagno, along with other Cablevision officials (Tom Rutledge and Mac Budill), [redacted] Ex. A, at 11-14 (Cablevision Trial Brief, Mar. 12, 2013).[2] There is no evidence that the GSN re-tiering had anything to do with WE tv or Wedding Central; former Rainbow executives are prepared to testify at trial that they had no knowledge of Cablevision's decision prior to the re-tiering. Ex. A, at 15.

Mr. Sapan's limited involvement in discussions concerning GSN was in the context of exploring a resolution of the parties' dispute *after* Cablevision had decided

[2] Cablevision submits the attached Exhibits A through H in support of its opposition. Certain Exhibits are excerpted portions of documents that have previously been filed with the Court. References to GSN's Motion, and the exhibits attached thereto, are in the form "Mot. at __" and "Mot. Ex. __."

to move GSN to the S&E Tier. Following the re-tiering decision, Derek Chang, a senior executive of GSN-owner DIRECTV, contacted Cablevision COO Tom Rutledge about [redacted] Ex. B, at 28-30 (GSN Trial Brief, Mar. 12, 2013); Ex. A, at 14-15. This request precipitated a handful of conversations between Mr. Chang, Mr. Sapan, and Robert Broussard (Rainbow's senior distribution executive) exploring a potential business resolution of the dispute that included discussions concerning DIRECTV's willingness to carry Wedding Central. Ex. B, at 29; Ex. A, at 15. In the end, DIRECTV declined to carry Wedding Central and Cablevision declined to reverse its decision to place GSN on the S&E Tier.

Both DIRECTV's Mr. Chang and Rainbow's Mr. Broussard were deposed at length about the meetings and telephone calls they had concerning DIRECTV's carriage of Wedding Central. *See*, *e.g.*, Ex. C (Chang Dep. Tr. 127-137); Ex. D (Broussard Dep. Tr. 36-43). Both recalled largely the same details of those discussions. *Compare, e.g.*, Ex. C, at 129:20-130:22 *with* Ex. D, at 36:15-37:18; 39:18-42:15. Both have been identified by the parties as witnesses who will testify at trial. Although the documentary and testimonial record makes it clear that Mr. Sapan participated in those conversations, GSN never sought to depose him before October of this year. Indeed, GSN was prepared to go to trial without deposing or listing Mr. Sapan as a trial witness in March 2013, when GSN identified Mr. Sapan as a "key individual" and dedicated an entire section of its Trial Brief to the conversations he and Mr. Broussard had with Mr. Chang. Ex. B, at 27-30 & Appendix B.

Following the *Tennis Channel* decision in May 2013, GSN requested "[l]imited further discovery" to explore the D.C. Circuit's purportedly "new test for determining whether a vertically integrated MVPD has a legitimate business purpose to treat unaffiliated program services differently from affiliated services." Ex. E, at 2-3 (Joint Status Report, Apr. 10, 2014). GSN made clear that supplemental discovery would be "narrowly tailored" and further represented that it "does not seek to reopen the record 'wholesale.'" Ex. E, at 3, 8. GSN identified three specific areas of discovery it wished to pursue that focus on Cablevision as a video programming distributor: 1) "the benefits that Cablevision was foregoing by repositioning GSN to a narrowly penetrated tier;" 2) "the relative costs and benefits associated with broad carriage of WE tv and Wedding Central;" and 3) "who was responsible for key carriage decisions related to the repositioning of GSN and why those decisions were made." Ex. E, at 5-7.

Based on GSN's representations concerning its need for supplemental discovery, the Presiding Judge granted GSN's request (Ex. F (Order, Apr. 17, 2014)), and the parties have since exchanged a discrete amount of supplemental discovery focused on Cablevision and GSN, not AMC or its predecessors. Despite the narrow scope of the parties' supplemental discovery to date, GSN noticed Mr. Sapan's deposition. After a letter exchange in which GSN gave facially unsatisfactory grounds for seeking Mr. Sapan's testimony, Cablevision informed GSN that Mr. Sapan's deposition was unwarranted in this supplemental discovery phase and that Cablevision would move for a protective order. GSN's motion to compel followed several hours later, before Cablevision's motion was filed.

ARGUMENT

Against this background, GSN can establish no legitimate basis for subjecting AMC's CEO to a disruptive deposition with little or no probative value. The record evidence shows that Mr. Sapan had no involvement whatsoever in Cablevision's internal decision-making or interactions with GSN in the period leading up to the re-tiering decision in 2010. This makes sense: Mr. Sapan did not work for Cablevision's cable business at the time of the re-tiering and has no first-hand knowledge of Cablevision's specific network carriage cost structure or business strategies relating to GSN. Nor could Mr. Sapan offer testimony bearing on the purported "new tests" articulated in *Tennis Channel*, all of which concern the costs and benefits of Cablevision's GSN re-tiering decision and the potential discriminatory intent of Cablevision's executives in deciding to move GSN to the S&E Tier.

In order to justify burdening Mr. Sapan with a deposition, GSN has tried to shoehorn his testimony into the narrow supplemental discovery the Presiding Judge ordered following the *Tennis Channel* decision. GSN suggests that the discussions with Mr. Chang concerning DIRECTV's carriage of Wedding Central could inform a "deeper discriminatory purpose" in Cablevision's decision to re-tier GSN, because [redacted] Mot. at 4. But this misrepresents the record. The conversations between Messrs. Sapan and Broussard, of Rainbow, and Mr. Chang, of DIRECTV, [redacted]

[redacted] Ex. G, at ¶ 56 (Cablevision Trial Ex. 234 (Direct Testimony of Thomas Montemagno).) Any conversations Mr. Sapan had with DIRECTV are disconnected from the allegedly wrongful conduct and have no relevance to the issues approved for supplemental discovery by the Presiding Judge. [3]

Moreover, the "deeper discriminatory purpose test" is not new at all; a showing of discrimination has always been part of plaintiff's burden under the Telecommunications Act. The DC Circuit opinion in *Tennis Channel* did nothing to alter that. GSN explored the issues surrounding Wedding Central carriage on DIRECTV at length in the first round of discovery—via testimony from Mr. Broussard, Mr. Chang, and others—and could have sought Mr. Sapan's deposition at that time if it was relevant and non-cumulative. The opportunity to engage in supplemental discovery on issues surrounding Cablevision's business analysis for the re-tiering does not give GSN the chance to re-open fact discovery because it does not like the state of the record.

Perhaps recognizing this, GSN also argues that it needs Mr. Sapan to testify about the "costs to Cablevision of carrying its affiliated, similarly situated networks including WE tv and Wedding Central, broadly," which GSN says are implicated in the "net benefit" inquiry outlined in the *Tennis Channel* decision. Mot. at 3. But Mr. Sapan has nothing new to say on this topic, about which GSN has obtained ample evidence already. For example, Cablevision has produced its affiliation

[3] Indeed, the Media Bureau questioned whether the discussions between the parties and their affiliates after the repositioning decision were even sufficient to establish a *prima facie* case of discrimination on the basis of affiliation. Ex. H, at ¶¶ 35-36 (Hearing Designation Order).

agreements with WE tv and Wedding Central, as well as documents discussing Cablevision's payments to WE tv. The parties' experts also will prepare supplemental testimony to address the *Tennis Channel* issues. Thus, these topics have already properly been explored with reference to documents and testimony from those involved in the "cable" side of Cablevision's business, who conducted analysis and made the decision to move GSN to the S&E Tier. Evidence from Rainbow, on the "content" side of the business, has no bearing on the matters discussed in the *Tennis Channel* opinion. To the extent that Rainbow's views on Cablevision's programming costs are at all relevant, GSN has had the opportunity to depose Mr. Broussard, Rainbow's head of distribution, and he will testify at trial.

Indeed, the one document GSN cites from Cablevision's supplemental production undermines any claim that Mr. Sapan should be compelled to testify. The document contains two November 2009 emails and an attachment sent from Mr. Montemagno to Mr. Broussard discussing [redacted] Mot. Ex. 3. Mr. Sapan's name appears nowhere on the emails, and the contents of the attachment were produced in October 2012 as part of Cablevision's original document production. Any questions about this document should have been directed to Mr. Montemagno or Mr. Broussard, both of whom have been deposed and will testify at trial.

Likewise, GSN's claim that Mr. Sapan [redacted] and the documents it cites in support of this argument (Mot. at 3 & Exs. 1-2) are both nothing new and, more importantly, have nothing to do with the "net benefit" test that GSN has

extracted from *Tennis Channel*. As for the first document, [redacted] it was produced by Cablevision in discovery over two years ago, was introduced into evidence at Mr. Bickham's deposition, and appeared on GSN's trial exhibit list. Mot. Ex. 2. To the extent that this document reveals something about the "content" side of Cablevision's business, GSN had the opportunity to depose Kim Martin, the head of WE tv and Wedding Central during the relevant time period, Elizabeth Doree, the head of programming for the networks, and Mr. Broussard, who was in charge of distributing the networks. Any of them could have been asked about this document during their depositions, and Ms. Doree and Mr. Broussard will testify at trial. Mr. Sapan's testimony would only be cumulative. As for the second document, it too was produced in 2012 and, as GSN points out in its motion, concerns [redacted] Mot. Ex. 1. On its face, the document has nothing to do with GSN, WE tv, or Wedding Central, and certainly nothing to do with "the costs to Cablevision of carrying its affiliated, similarly situated networks . . . broadly." Mot. at 3. In any event, the time to ask Mr. Sapan about these documents was during the first round of discovery, not now.

Under these circumstances, the Presiding Judge should exercise his discretion to protect Mr. Sapan from a so-called "apex" deposition, because he does not have detailed or unique knowledge of any facts in dispute—much less facts relevant to the circumscribed supplemental discovery the Presiding Judge ordered. *See, e.g.*, *Alliance Industries, Inc. v. Longyear Holding, Inc.*, 2010 WL 4323071, at *3-4 (W.D.N.Y. Mar. 19, 2010) ("'Apex' depositions are disfavored in this Circuit unless the

executives have personal knowledge of relevant facts or some unique knowledge that is relevant to the action. Included in this concept is whether compelling the official's testimony would be cumulative to testimony from other sources within the subject enterprise." (citations omitted)) (disallowing deposition of CEO where plaintiffs failed to show he had unique knowledge of the facts at hand); *Dauth v. Convenience Retailers, LLC*, 2013 WL 4103443, at *2 (N.D. Cal. Aug. 12, 2013) (denying apex deposition). The topics on which GSN claims Mr. Sapan has relevant, independent knowledge will, as a rule, be covered by other trial witnesses or were covered in detail by other deponents. The fact that Mr. Sapan does not appear on either party's list of trial witnesses only confirms that his testimony is either irrelevant or, at best, cumulative.

[Remainder of page intentionally left blank]

CONCLUSION

For all of the foregoing reasons, GSN's motion to compel a date certain for the deposition of Josh Sapan should be denied.

Respectfully submitted,

/s/ Gary R. Carney_____
Jay Cohen
Andrew G. Gordon
Gary R. Carney
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Tara M. Corvo
Ernest C. Cooper
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
(202) 434-7300

Scott A. Rader
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
Chrysler Center
666 Third Avenue
New York, NY 10017
(212) 935-3000

Defendant Cablevision Systems Corp.

December 10, 2014

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on December 10, 2014, copies of the foregoing were served by electronic mail upon:

Stephen A. Weiswasser
Paul W. Schmidt
Elizabeth H. Canter
Neema D. Trivedi
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000
Counsel to Game Show Network, LLC

C. William Phillips
Laura Flahive Wu
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018-1405
(212) 841-1000

Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mary L. Gosse
Administrative Officer
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Austin K. Randazzo
Attorney-Advisor/Law Clerk
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Gary Schonman
Special Counsel
Investigations & Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

P. Michele Ellison
Chief
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Pamela Kane
Deputy Chief
Investigations & Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

William Knowles-Kellett
Investigations & Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Counsel to the Enforcement Bureau

__/s/ Ernest C. Cooper_____
Ernest C. Cooper

Exhibit A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
GAME SHOW NETWORK, LLC,	)	MB Docket No. 12-122
Complainant,	)	File No. CSR-8529-P
	)	
v.	)	
	)	
CABLEVISION SYSTEMS CORP.,	)	
Defendant	)	

TO: Chief Administrative Law Judge Richard L. Sippel

TRIAL BRIEF OF DEFENDANT CABLEVISION SYSTEMS CORP.

Jay Cohen
Andrew G. Gordon
Gary R. Carney
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Howard J. Symons
Tara M. Corvo
Robert G. Kidwell
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
(202) 434-7300

March 12, 2013

II. THERE IS NO DIRECT EVIDENCE THAT CABLEVISION DISCRIMINATED AGAINST GSN BASED ON AFFILIATION

There is no document, no testimony—no evidence at all—showing that Cablevision's repositioning of GSN in December 2010 had anything whatsoever to do with WE tv or Wedding Central. Nor is there any proof that Cablevision based its decision on affiliation or non-affiliation of GSN. As Cablevision's former President, John Bickham, testified, [redacted][18] [redacted].[19]

Mr. Bickham's testimony will be buttressed by that of Tom Montemagno, Executive Vice President of Programming for Cablevision. He will testify that, [redacted][20] [redacted].[21] [redacted],[22] [redacted].

18 [redacted]

19 [redacted]

20 [redacted]

21 [redacted]

22 [redacted]

[redacted][23]

Mr. Montemagno will also explain that [redacted][24] [redacted][25] [redacted][26] No witness will contradict him.

Mr. Montemagno will testify [redacted][27] [redacted][28] There can be no dispute concerning the cost pressures facing Cablevision and other MVPDs; in fact, {{GSN

23 [redacted]
24 [redacted]
25 [redacted]
26 [redacted]
27 [redacted]
28 [redacted]

[redacted].[29] [redacted]

[redacted].[30] [redacted][31] [redacted].[32] [redacted].[33] [redacted].[34] [redacted]

---

29 [redacted]

30 [redacted]

31 [redacted]

32 [redacted]

33 [redacted]

34 [redacted]

Cablevision's lack of consideration of WE tv and Wedding Central is further demonstrated by its contemporaneous decision to give carriage to another unaffiliated women's network, OWN, the Oprah Winfrey Network. Had Cablevision been seeking to protect its affiliated women's networks at the expense of GSN, it would not have launched another independent network that is indisputably similar in terms of programming and target audience to WE tv and Wedding Central. In short, the evidence will show Cablevision's carriage decision concerning GSN to be the product of precisely the type of non-discriminatory analysis that a cable operator such as Cablevision should perform in the ordinary course of its business to offer the most compelling service to its subscribers. That decision cannot support a finding of discrimination on the basis of affiliation under Section 616.[35]

GSN nonetheless attempts to reverse engineer a claim of direct discrimination from discussions between the parties after Cablevision made its re-tiering decision. After Cablevision notified GSN of the repositioning on December 3, 2010, GSN Board member and DIRECTV executive Derek Chang contacted Tom Rutledge, then COO of Cablevision. Mr. Chang urged Mr. Rutledge not only to reconsider the GSN carriage decision, but specifically to [redacted]

[redacted]

[35] Relying on the Presiding Judge's decision in *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, 26 FCC Rcd. 17160 (ALJ 2011). GSN will argue that Cablevision had an obligation to engage in a simultaneous cost-benefit analysis with respect to its affiliated networks. We do not believe that is what Section 616 requires. And in any case, WE tv was considerably more popular among its subscribers than GSN, ranking [redacted]

[redacted] Thus, it was GSN, not Cablevision, that injected DIRECTV into the GSN carriage discussions, and only after the re-tiering decision had already been made.[36] And although Mr. Chang had subsequent discussions with Josh Sapan, Rainbow's president, and Robert Broussard, Rainbow's senior distribution executive, about DIRECTV's willingness to carry Wedding Central,[37] there is no evidence at all that Cablevision made the decision to re-tier GSN in order to induce such discussions. To the contrary, Mr. Montemagno will testify that carriage of Wedding Central by DIRECTV had nothing to do with Cablevision's decision. And Mr. Broussard and Ms. Martin, president of WE tv and Wedding Central, will explain that they had no prior knowledge at all of the decision made by Cablevision.

Moreover, there is no evidence at all to suggest that Wedding Central carriage played any role in Cablevision's decision. To the contrary, the evidence will show GSN to be the only party that thought about any linkage between carriage of the two networks prior to Cablevision's re-tiering decision. [redacted][38]

---

36 Montemagno Direct Test. ¶ 62; *see also* [redacted]

37 [redacted]

38 [redacted]

Exhibit B

Public Version

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
GAME SHOW NETWORK, LLC, Complainant,	)	MB Docket No. 12-122 File No. CSR-8529-P
v.	)	
CABLEVISION SYSTEMS CORPORATION, Defendant.	)	
Program Carriage Complaint	)	

TO: Marlene H. Dortch, Secretary
ATTN: Chief Administrative Law Judge Richard L. Sippel

TRIAL BRIEF OF GAME SHOW NETWORK, LLC

Stephen A. Weiswasser
Paul W. Schmidt
Phyllis A. Jones
Elizabeth H. Canter
Neema D. Trivedi
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

C. William Phillips
Laura Flahive Wu
Covington & Burling LLP
620 Eighth Avenue
New York, NY 10018-1405
(202) 662-1000

Counsel to Game Show Network, LLC

March 12, 2013

inappropriate nature of the sports tier for a network like GSN, which contains no sports programming and which appeals to viewers that would never subscribe to that tier.[140]

Cablevision tried to neutralize these complaints by [redacted] a recognition that GSN was not suitable for a sports package.[141] And despite Cablevision's insistence that non-sports networks were on the tier, Cablevision did not consider [redacted],[142] and *all* of the other networks carried on the tier are sports- or male-oriented.

Second, Cablevision allowed [redacted].[143] This [redacted] may have caused Cablevision a financial loss because it presumably was obligated to pay license fees to every service carried on the sports tier for each of the roughly [redacted] subscribers upgraded to the tier [redacted]. In addition, Cablevision would suffer a loss of about [redacted] for each subscriber who left Cablevision because of the retiering.[144]

IV. Cablevision Used The GSN Tiering To Try To Gain Carriage Of Wedding Central.

After announcing its plans to tier GSN, Cablevision made clear it would restore the network's carriage only if GSN's partial owner, DIRECTV, agreed to launch Cablevision affiliate Wedding Central. This forced trade constitutes an independent violation of Section 616.

---

[140] *See, e.g.*, GSN Exhs. 110, 113, 114, 115, 117, 119, 126.

[141] GSN Exhs. 121, 122, 125, 127.

[142] GSN Exh. 217, Bickham Dep. Tr. 115:23-116:2, 119:14-120:5; *see also id.* at 108:23-109:2 (explaining that [redacted]).

[143] GSN Exhs. 120, 124, 125.

[144] Singer Written Direct, ¶¶ 15, 75.

A. Wedding Central did not merit distribution on DIRECTV.

Cablevision gave Wedding Central favorable carriage from its inception in 2009 until it was shuttered in 2011, distributing the network to approximately [redacted] of its homes. Beyond Cablevision, Wedding Central gained carriage only on [redacted].[145] No other MVPD would agree to carry the network, [redacted].[146]

Wedding Central was eager to reach a distribution deal with DIRECTV—the second largest MVPD with nearly 20 million subscribers. According to the network's President Kim Martin, [redacted].[147] At the end of 2009, [redacted].[148] DIRECTV declined to carry Wedding Central based on its view that the network did not merit distribution.[149] [redacted][150]

B. Cablevision used the repositioning of GSN to attempt to extract carriage for Wedding Central on DIRECTV.

In December 2010, GSN management committee member and DIRECTV executive Derek Chang contacted Cablevision COO Tom Rutledge to urge Cablevision to reconsider its tiering decision. Mr. Chang had never been involved in carriage negotiations on behalf of GSN

---

[145] *See* GSN Exhs. 205 & 206.

[146] *See, e.g.*, GSN Exh. 101 [redacted]). As Mr. Dolan testified, [redacted]. GSN Exh. 216, Dolan Dep. Tr. 195:18-197:3.

[147] GSN Exh. 208, Martin Dep. Tr. 85:5-14, 86:23-88:18.

[148] [redacted]

[149] *Id.*

[150] GSN Exh. 214, Broussard Dep. Tr. 46:7-20.

prior to this point, but agreed to contact Mr. Rutledge because of the importance to GSN of Cablevision's distribution and because he considered it unusual that Cablevision would communicate a final tiering decision without discussion.[151]

Cablevision then realized that it had an opportunity to leverage its carriage of GSN to advantage its own programming. Mr. Rutledge instructed Rainbow to come up with a [redacted][152] In response to Mr. Rutledge's invitation, Mr. Sapan and Mr. Broussard made an [redacted] that DIRECTV launch Wedding Central.[153]

At Mr. Rutledge's urging, Mr. Chang contacted Mr. Sapan, and Mr. Sapan made clear that Cablevision would consider continuing GSN's broad distribution on Cablevision's systems if DIRECTV would consider giving distribution to Cablevision's Wedding Central.[154] The Wedding Central proposal was [redacted].[155] Because DIRECTV had decided that Wedding Central did not merit distribution, it turned down Rainbow's offer. After several attempts to persuade DIRECTV to carry Wedding Central, Mr. Chang finally declined Rainbow's Wedding Central proposal during a conversation on January 31, 2011. The next day, Cablevision formally moved GSN to its sports tier.[156]

---

[151] Goldhill Written Direct, ¶ 17.

[152] GSN Exh. 98.

[153] [redacted]

[154] Goldhill Written Direct, ¶ 18, referencing GSN Exhs. 99 & 102.

[155] [redacted]

[156] Even after Cablevision tiered GSN, [redacted]

(continued...)

At the same time, GSN offered Cablevision a [redacted] on its effective rates in exchange for a restoration of carriage. Cablevision rejected that proposal, insisting that GSN offer its service for [redacted], which Cablevision knew was not a viable option for the network because of existing [redacted] with other distributors. The only inference to be drawn from Cablevision's position is that it had no interest in a deal with GSN unless value could be extracted from DIRECTV. Cablevision's effort to tie fair distribution of an unaffiliated network to benefits for a Cablevision-affiliated network is a separate violation of Section 616.

V. The Retiering Has Unreasonably Restrained GSN's Ability To Compete.

Cablevision's discrimination has directly harmed GSN's ability to compete in a number of ways. *First*, GSN's overall subscriber base was reduced by more than [redacted], which translates to a loss of [redacted] in annual license fee revenues. *Second,* GSN's diminished access to viewers impacts its ability to generate advertising revenue.[157] GSN estimates that it will lose approximately [redacted] in advertising revenues annually.[158] GSN's financial models suggest that it will realize direct

---

[redacted]. *See* GSN Exh. 128 ([redacted]); GSN Exh. 130 ([redacted]); GSN Exh. 137 ([redacted]).

[157] This is because, in determining how much to pay for advertising time on a given network, buyers look at the network's viewership, as measured through standard Nielsen ratings. And because advertisers generally pay for advertising on a "cost per thousand viewers," or CPM, basis, the loss of [redacted] of potential viewers immediately deprives GSN of revenue.

[158] Zaccario Written Direct, ¶ 8. WE tv's senior executives agree [redacted] GSN Exh. 215, Dorée Dep. Tr. 96:19-97:5; *see also* GSN Exh. 208, Martin Dep. Tr. 186:11-12 [redacted].

APPENDIX B

LIST OF KEY INDIVIDUALS
PRESENTLY OR FORMERLY AT GSN & CABLEVISION

GSN	
Derek Chang	Former Executive Vice President of Content Strategy and Development, DIRECTV & Former Member of GSN Management Committee
Dennis Gillespie	Former Senior Vice President, Distribution
David Goldhill	President & Chief Executive Officer
Kelly Goode	Former Senior Vice President, Programming
Dale Hopkins	Executive Vice President, Distribution Former Chief Marketing Officer
John Zaccario	Executive Vice President, Advertising Sales
CABLEVISION	
John Bickham	Former President, Cable & Communications, Cablevision Systems Corp.
Robert Broussard	President, AMC Networks Distribution (formerly Rainbow Media Holdings)
James Dolan	President & Chief Executive Officer, Cablevision Systems Corp.
Kimberly Martin	President and General Manager, WE tv Former President and General Manager, Wedding Central
Thomas Montemagno	Executive Vice President, Programming, Cablevision Systems Corp.
Thomas Rutledge	Former Chief Operating Officer, Cablevision Systems Corp.

Josh Sapan	President & Chief Executive Officer, AMC Networks, Inc. (formerly Rainbow Media Holdings)

Exhibit C

Highly Confidential
Exhibit Withheld

Exhibit D

Highly Confidential
Exhibit Withheld

Exhibit E

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Game Show Network, LLC,	)	MB Docket No. 12-122
Complainant,	)	File No. CSR-8529-P
	)	
v.	)	
	)	
Cablevision Systems Corp.,	)	
Defendant	)	

PARTIES' JOINT STATUS REPORT

Pursuant to the order of the Chief Administrative Law Judge dated March 12, 2014, as amended, Cablevision Systems Corp. ("Cablevision"), Game Show Network, LLC ("GSN"), and the Enforcement Bureau ("Enforcement Bureau") (collectively, the "parties") submit the following joint status report in the above-captioned action.

A. Background

On June 7, 2013, GSN and Cablevision jointly moved for a continuance of the hearing in this matter, on the grounds that a continuance would allow the parties an opportunity to consider the potential impact of the D.C. Circuit's May 28, 2013 panel decision in *Comcast Cable Communications v. FCC*, No. 12-1337 (D.C. Cir. *filed* August 1, 2012) (the "*Comcast Cable* action") on the above-captioned proceeding. On December 3, 2013, Tennis Channel filed with the United States Supreme Court a petition for writ of certiorari in the *Comcast Cable* action, and the present matter was further continued while the *Comcast Cable* action remained subject to further review. The Supreme Court denied the petition for writ of certiorari on February 24, 2014. On March 11, 2014 Tennis Channel filed with the Commission a Petition for

Further Proceedings seeking a ruling on whether the *Comcast Cable* record satisfies the standard set out by the D.C. Circuit. For the convenience of the Presiding Judge, the pleadings filed in that matter are attached for the record.

Following the Supreme Court's denial of the petition for certiorari in the *Comcast Cable* action, the Presiding Judge ordered the parties to submit a Joint Status Report, "describing discovery needs and proposed dates for deposing witnesses, exchanging evidence, and commencing trial." On March 12, 2014, the Presiding Judge granted the parties until April 7, 2014 to submit a further status report. On April 8, the Presiding Judge granted the parties' request to extend the deadline for submission of a status report to April 10, 2014.

B. Status Report of the Parties

1. GSN

GSN hereby responds to the Presiding Judge's request that the parties submit a report "describing discovery needs and proposed dates for deposing witnesses, exchanging evidence, and commencing trial," in light of the *Comcast Cable* action.[1] GSN's counsel have conferred with counsel for Cablevision and, based on that discussion, we include in this Joint Status Report a mutually agreeable proposed schedule intended to allow the parties appropriate time to develop a complete record that accounts from the *Comcast Cable* action, while consistent with the need for expeditious review of the case.

Limited further discovery in this proceeding is appropriate in light of the *Comcast Cable* action. There, a panel of the D.C. Circuit vacated the Commission's decision on the grounds that it was not supported by "substantial evidence." GSN respectfully requests limited

[1] *Game Show Network, LLC v. Cablevision Systems Corp.*, Order, MB Docket No. 12-122, File No. CSR-8529-P, FCC 12M-28, at 1 (Chief ALJ March 12, 2104).

further discovery to account fully for the potential impact of the D.C. Circuit's panel decision, including, but not limited to, the panel's adoption of a new test for determining whether a vertically integrated MVPD has a legitimate business purpose to treat unaffiliated program services differently from affiliated services. Its test had never previously been articulated or applied by the Commission or the Presiding Judge. In addition, it is appropriate for the parties to conduct tailored discovery to freshen the record evidence, which was developed more than a year ago. GSN's request for narrowly focused discovery is consistent with the Presiding Judge's recent guidance that "additional discovery would likely be necessary to address the issues elevated by [the *Comcast Cable*] decision." Mar. 12, 2014 Order at 1-2.

Cablevision disagrees that the D.C. Circuit changed the standard in any way and therefore disagrees on the scope and form of further discovery. It proposes limitations on GSN's further discovery without having seen our further discovery requests. Cablevision's objection is therefore premature. Instead, GSN should be permitted to pursue limited, narrowly-tailored discovery on the issues raised by the D.C. Circuit's *Comcast Cable* decision, and Cablevision may object to GSN's further discovery requests in the normal course. In the event of such objections, the parties will endeavor to resolve any disagreements, as they have successfully throughout these proceedings. If the parties are unable to resolve any disagreements, they could elevate any outstanding discovery disputes to the Presiding Judge.

For the reasons set forth below, GSN requests limited further discovery:

The* Comcast Cable *action created a new evidentiary test that justifies further discovery. In vacating the Commission's Order, the *Comcast Cable* panel held that the evidence on which the Commission and the Presiding Judge relied did not suffice to establish that Comcast discriminated against Tennis Channel. The *Comcast Cable* panel identified three forms

of proof that *could* have supported a finding that Comcast did not have a legitimate business purpose for treating Tennis Channel differently from its competing affiliated services. Following is an overview of those newly-established tests, and a statement of proposed discovery in light of each test.

First, the Commission could find that the cable operator's distribution business could have obtained a "net benefit" from carrying the independent programmer more broadly, but that it sacrificed this benefit. Under the panel's reasoning, such evidence would establish that the cable operator's real motive was to reap illegitimate advantages for its affiliated and competing programming services.[2] Such an analysis of benefits could be qualitative and need not be quantitative, the court noted, and it suggested that evidence of subscriber "churn"— that is, evidence that the operator was losing subscribers solely because of its refusal to give the programming service broader carriage — might have been one place to start, but was absent in the record before it.[3] Endorsing a non-exclusive list of qualitative factors raised in the testimony of a cable executive, the court indicated that the benefits of carrying a network could also be

---

[2] *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 987 (D.C. Cir. 2013). The court suggested that the cable operator's refusal to incur the greater license fees associated with carrying the independent programmer more broadly was not itself discriminatory unless the operator had reason to expect that the benefits of such broad carriage to its distribution business would outweigh that cost. *Id.* at 985 ("Tennis showed no corresponding benefits that would accrue to Comcast by its accepting the change. . . . Of course the record is very strong on the proposed increment in licensing fees, in itself a clear negative. The question is whether the other factors, and perhaps ones unmentioned by Comcast, establish reason to expect a net benefit. But neither Tennis nor the Commission offers such an analysis on either a qualitative or a quantitative basis.").

[3] *Id.*

assessed by "the nature of the programming content involved; the intensity and size of the fan base for that content; . . . [and] the network's carriage on other MVPDs."[4]

GSN respectfully requests that the Presiding Judge permit limited additional discovery related to the benefits that Cablevision was foregoing by repositioning GSN to a narrowly penetrated tier. We expect this would include further factual and expert evidence relating to subscriber churn and other qualitative and quantitative costs and benefits associated with Cablevision's carriage of GSN on a narrowly penetrated sports tier as compared to a more broadly penetrated digital tier. For example and for illustrative purposes only, GSN anticipates further discovery focused on the following:

- Evidence of whether Cablevision's distribution business would have a "net benefit," perceived or otherwise, to carriage of GSN, including factual evidence of the direct and indirect costs to carriage of GSN and the value Cablevision perceived in carrying GSN.

- Expert testimony related to whether Cablevision would have a "net benefit," perceived or otherwise, to carriage of GSN.

- Documents concerning subscriber churn or subscriber disconnects by video service subscribers, and additional documents reflecting the rebates and/or subsidies Cablevision has provided to subscribers who threatened to disconnect from Cablevision's video services.

- Documents and evidence demonstrating the benefits to Cablevision of carriage of GSN.

- Documents and evidence concerning Cablevision's analysis of consumer goodwill.

Second, the *Comcast Cable* panel observed that the Commission could conclude that a cable operator's carriage decision was discriminatory if it found that "incremental losses from carrying [an independent programming service] in a broad tier would be the same as or less

[4] *Id.*

than the incremental losses [the cable operator] was incurring from carrying [its affiliated networks] in such tiers."[5] In other words, even if carrying an unaffiliated programming service on a broadly distributed tier does not provide a "net benefit" for a cable operator, the D.C. Circuit understood that failing to carry it on that tier would be discriminatory if the operator were willing to carry its own affiliated networks on that tier at an even *greater* net loss or *lesser* profit to the operator's distribution business.[6] This alternative finding also permits both qualitative and quantitative evidence regarding the relative benefits of carrying each network broadly. The *Comcast Cable* court noted that the Commission could find either an affirmative net benefit or lesser incremental losses by means of a "comparative" analysis of the relative costs and benefits of broad distribution of these networks.[7]

GSN respectfully requests that the Presiding Judge permit limited additional discovery related to the relative costs and benefits associated with broad carriage of WE tv and Wedding Central. We expect this would include further factual and expert evidence relating to subscriber churn and other qualitative and quantitative costs and benefits associated with Cablevision's carriage of WE tv and Wedding Central on a broadly penetrated digital tier. For example and for illustrative purposes only, GSN anticipates further discovery focused on the following:

---

[5] *Id.* at 986.

[6] Of course, a cable operator may pay the license fees for its affiliated programming services from one side of its business to another, but the test contemplated by the court requires consideration of the relative value proposition to the operator's distribution business alone.

[7] *Id.* at 987. What the Commission found — that the three networks are "similarly situated" when "compared along a series of important axes," Order ¶ 51 — was not the same as the finding required by the D.C. Circuit, because the Commission's more general findings of similarities were not specifically aimed at assessing the relative costs and benefits for Comcast's distribution business with respect to broad carriage of each network. *See Comcast*, 717 F.3d at 987.

- Evidence of whether continued broad carriage of GSN would have resulted in smaller losses or greater profits to Cablevision's distribution business than broad carriage of WE tv or Wedding Central, including factual evidence of the direct and indirect costs to carriage of the networks and evidence of the value Cablevision perceived and obtained in carrying each of the networks.

- Expert testimony related to whether Cablevision would have perceived that continued broad carriage of GSN would result in smaller incremental losses or greater profits to its distribution business than broad carriage of WE tv or Wedding Central. This would include appropriate evidence of promotional support and other similar advantages that Cablevision provided WE tv or Wedding Central that are necessary to fully understand the context for WE tv and Wedding Central's performance on Cablevision systems.

Third, the court held that the Commission could rely on a finding that Comcast's "otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose."[8] GSN respectfully requests the opportunity to conduct further discovery, including deposition discovery, on the questions of who was responsible for key carriage decisions related to the repositioning of GSN and why those decisions were made. The witnesses deposed previously in this proceeding claimed to have no recollection of who made certain key decisions and why those decisions were made, and, in light of the importance that the D.C. Circuit attached to whether a carriage decision is pretext for discrimination, GSN respectfully requests further discovery tailored to address this question. Once facts concerning Cablevision's repositioning of GSN are revealed, additional discovery relevant to the pretext inquiry may be appropriate.

---

[8] *Id.* In the *Comcast Cable* action, the court found that the Commission had not "invoked th[is] concept," *id.*, although the May 21, 2014 Petition filed by Tennis Channel argues that there is evidence in the record that is sufficient for the Commission, on remand, to make express findings of fact that Comcast's carriage decisions were pretext for discriminatory conduct.

Cablevision's arguments that GSN has "thoroughly exhausted" the issues raised in the* Comcast Cable *action are incorrect. Nothing in governing law at the time of the Presiding Judge's decision focused attention on the other evidentiary issues that the D.C. Circuit effectively found dispositive in the *Comcast Cable* action. The D.C. Circuit's decision clearly imposed new evidentiary tests not contemplated at the time the parties conducted discovery in this matter, a proposition that the Presiding Judge is perhaps uniquely qualified to evaluate. While GSN does not seek to reopen the record "wholesale," limited further discovery is therefore appropriate. Moreover, GSN respectfully suggests that it would be premature to impose arbitrary limitations on further discovery at this juncture (i.e., in the absence of concrete discovery requests), such as those Cablevision outlines in this submission.

Finally, the record should be updated to ensure that it is based on current data and evidence. It has now been a full year since the parties completed the initial discovery process, and the record is therefore stale in certain respects. In addition to ensuring that the Presiding Judge has the benefit of expert reports that are appropriately addressed to the D.C. Circuit's decision in the *Comcast Cable* action, such expert reports should be based on the most recent data relevant to this proceeding. As the Presiding Judge has stated, "expert opinions should be based on *current data.*"[9] Further, additional evidence may have developed over the past year on key issues for which further discovery is appropriate. For example, there may be additional information about the competitive impact of Cablevision's repositioning of GSN. GSN therefore respectfully requests that the Presiding Judge permit the parties to conduct limited additional discovery (including both factual and expert) to freshen the record.

---

[9] *Game Show Network, LLC v. Cablevision Systems Corp.*, Order, MB Docket No. 12-122, File No. CSR-8529-P, FCC 12M-28, at 1 (Chief ALJ March 12, 2104) (emphasis added).

For the foregoing reasons, GSN respectfully requests that the Presiding Judge allow tailored discovery focused on the additional evidentiary tests introduced by the D.C. Circuit's decision in the *Comcast Cable* action and on freshening the now-stale evidentiary record to the extent appropriate.

The parties clearly disagree about the appropriate scope and nature of discovery, although the schedule they jointly propose is adequate to accommodate either view. GSN respectfully requests that the Presiding Judge order that the parties endeavor to resolve any discovery disputes that arise in connection with GSN's concrete discovery requests on their own, and only in the absence of such resolution should the parties escalate such disputes to the Presiding Judge.

Estimated Dates for Deposing Witnesses, Exchanging Evidence and Commencing Trial

GSN, Cablevision, and the Enforcement Bureau have conferred and agreed to the procedural dates below. As noted, the parties have not reached agreement over whether interrogatories should be served.

May 1, 2014	Supplemental document requests served; interrogatories served.
May 16, 2014	Responses and objections to document requests and interrogatories served.
May 26, 2014	Supplemental document production begins; parties may serve fact deposition notices.
June 20, 2014	Supplemental document production ends.
July 16, 2014	Complainant's supplemental expert reports filed.

August 15, 2014	Defendant's supplemental expert reports filed; parties may serve expert deposition notices.
September 26, 2014	Deadline for completing all supplemental fact and expert depositions; discovery ends.
October 22, 2014	Supplemental trial briefs exchanged by **12:00 noon.**
October 22, 2014	Supplemental hearing exhibits and written direct testimony exchanged by **12:00 noon**.
November 11, 2014	Document Admissions Session commencing at **10:00 a.m.**
November 12, 2014	Hearing commences at **9:30 a.m.**

2. Cablevision

Cablevision has a fundamentally different view as to what, if anything, remains to be done before trial.

The D.C. Circuit's recent decision in *Comcast Cable Communications, Inc.* v. *FCC* (the "*Comcast Cable*" opinion),[10] reaffirmed that where an MVPD's challenged carriage decision is supported by a legitimate business rationale, no Section 616 violation exists. Faced with this precedent, GSN seeks to transform the Presiding Judge's offer of a brief supplemental discovery period into a complete "do-over" of the record for trial. GSN's proposal goes far beyond supplemental discovery and is not justified by anything said by the D.C. Circuit in the *Comcast Cable* decision. The appellate court did not create the purportedly "new tests" GSN claims necessitate its expansive discovery requests; the court merely assessed the well-developed trial record before it under the existing Commission standards for Section 616.

As was true in *Comcast Cable*, the parties in this case engaged in extensive and far-ranging fact and expert discovery to get the case ready for trial. GSN (through the same counsel) had every opportunity to develop the factual and expert record necessary to attack Cablevision's business justification for its re-tiering of GSN. There is simply no reason to start over now. As the Presiding Judge is aware, Cablevision's fundamental view is that no additional discovery is required and the case is trial ready, as it has been since June 25, 2013 when the matter was stayed to permit the appellate process in *Comcast Cable* to run its course. The Presiding Judge has made clear, however, that he will allow some supplementation of the discovery record. Cablevision's position is that other than modest updating of information to account for the

---

10 *Comcast Cable Communications* v. *FCC*, 717 F.3d 982 (D.C. Cir. 2013).

passage of time, there is nothing to discover—every topic GSN identifies in this status report has already been covered at length in the extensive fact and expert discovery to date. Accordingly, Cablevision respectfully requests that the Presiding Judge reject GSN's broad discovery plan and instead adopt the targeted supplemental discovery proposal Cablevision sets out below.

A. *Comcast Cable* Did Not Create New Evidentiary Tests for Section 616 Claims.

Contrary to GSN's contentions, the *Comcast Cable* opinion did not create new evidentiary tests for Section 616 claims that would justify additional discovery here. Nor did the appellate court find such evidentiary issues "dispositive," as GSN asserts. Rather, in *Comcast Cable*, the D.C. Circuit carefully assessed the evidence surrounding Comcast's legitimate business rationale for refusing to broaden the carriage of Tennis Channel—which the record established was based on a "straight-up financial analysis." In assessing this evidence, the D.C. Circuit specifically noted that it was following the "Commission's [existing] interpretation of § 616," which the D.C. Circuit assumed was correct for purposes of its analysis.[11] GSN now contends that "[n]othing in the governing law at the time of the Presiding Judge's decision focused attention" on these evidentiary issues. But in subsequent proceedings in *Comcast Cable*, the Tennis Channel—represented by the same counsel as GSN—has conceded that "[t]he D.C. Circuit made clear its view that it was following—*not changing*—the standards for Section 616 enforcement" in its decision.[12]

Under this settled interpretation of Section 616, the D.C. Circuit reaffirmed that "if the MVPD treats vendors differently based on a reasonable business purpose . . . there is no

---

11 *Id.* at 984.

12 Tennis Channel Pet. for Further Proceedings and Reaffirmation of Original Decision, *Tennis Channel, Inc.* v. *Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, at ii (Mar. 11, 2014) (emphasis added).

violation."[13] Thus, unless a complainant can rebut an MVPD's legitimate business rationale by showing that the MVPD was forgoing a net commercial benefit through its carriage decision, the Section 616 claim must fail.[14] In *Comcast Cable*, as the appellate court explained, "the record simply lacks material evidence that the Tennis [Channel's expanded carriage] proposal offered . . . any commercial benefit."[15]

The analysis could hardly come as a surprise to GSN, which focused its discovery in this case on the same type of inquiry: whether Cablevision had a legitimate business rationale for re-tiering GSN and whether the evidence established that such a business rationale was pretextual. Indeed, the broad sweep of GSN's prior discovery efforts reflects that GSN was fully cognizant of the operative legal and evidentiary standards under Section 616.

B. Every Subject on Which GSN Seeks Supplemental Discovery is Fully Developed in the Existing Record.

Seizing on dicta in the *Comcast Cable* opinion, GSN attempts to characterize the decision as fashioning a number of new evidentiary tests not found in governing law that GSN now needs substantial new discovery to address. Although Cablevision disagrees with that predicate, even if the Presiding Judge places weight on the various tangential statements found in the *Comcast Cable* opinion, the fact remains that GSN now seeks discovery on subjects that the parties have already thoroughly exhausted in document production and depositions.

Profitability of Carriage Decisions: GSN's first two purportedly new *Comcast Cable* tests focus on the profitability of an MVPD's carriage decisions. Here, however, the existing

---

13 *Id.* at 985.

14 *Id.* at 984, 987.

15 *Id.* at 987.

record includes extensive evidence addressing whether Cablevision chose to forgo a net benefit or incur incremental losses by moving GSN to a less-penetrated tier (and confirming that Cablevision's decision was the sort of "straight-up financial analysis" contemplated by *Comcast Cable*). And while GSN suggests that it also needs to examine whether Cablevision ever considered the benefits of re-tiering its affiliates WE tv or Wedding Central to a less penetrated tier of service, that is irrelevant under the *Comcast Cable* analysis.[16] Even if they were relevant, though, GSN has examined these subjects at length in fact and expert depositions. For example, Thomas Montemagno, Cablevision's Executive Vice President of Programming, and former Cablevision President John Bickham, both testified about Cablevision's profitability analysis of continued carriage of GSN and Cablevision's subsequent decision to move GSN to a less-penetrated tier.[17] Mr. Montemagno and Jonathan Orszag, one of Cablevision's expert witnesses, also addressed the costs and benefits of continued carriage of GSN and WE tv/Wedding Central in their depositions and Mr. Orszag's expert report.[18] Among other things, Mr. Orszag's expert report includes a subscriber "churn" analysis which was then critiqued by GSN's expert, Hal Singer, and scrutinized during the Orszag deposition. Moreover, GSN's existing document requests already cover the specific categories of information GSN identifies as relevant to

---

[16] GSN's request for discovery concerning potential repositioning of WE tv and Wedding Central reflects a fundamental misapprehension of *Comcast Cable*. As the D.C. Circuit explained, the relevant issue in a Section 616 dispute is *not* whether an MVPD should reposition an affiliated network, but whether failure to carry the complaining network in the same fashion as the affiliated network is discriminatory. *See Comcast Cable*, 717 F.3d at 986–87.

[17] *See, e.g.*, Montemagno Tr. 174:22–181:6, 199:23–204:13; Bickham Tr. 38:8–45:10.

[18] *See, e.g.*, Montemagno Tr. 36:18–45:9, 99:14–123:19; Orszag Tr. 256:10–267:5, 269:3–271:4.

carriage profitability analyses.[19] In short, the profitability of the carriage of the networks at issue in this case was at the heart of Cablevision's decision to re-tier GSN, and has been explored in detail in discovery. To the extent that GSN now wishes that it had prepared the case differently for trial, that provides no basis for putting Cablevision to the burden of re-opening wholesale the record of a case that has been trial ready for more than nine (9) months.

Evidence of Pretextual Motives: GSN's theory that Cablevision's legitimate business rationale for re-tiering GSN was pretextual is hardly new. To the contrary—as GSN concedes when it complains that the numerous depositions it has already taken yielded no evidence supporting this theory—this subject has been explored in nearly *every* deposition of Cablevision fact witnesses. GSN's contention that Cablevision's witnesses could not recall decision-making surrounding the GSN re-tiering is also demonstrably false. For example, Mr. Montemagno testified at length and in detail about the GSN re-tiering.[20] GSN's suggestion that it should now take depositions of other witnesses to probe the same issues should be rejected; it has already taken the depositions of the executives who played the critical role in the determination to re-tier GSN. The record on this point is fully developed, and, while it lends no support to GSN's pretextual motive theory, there is nothing to supplement.

---

[19] GSN served 32 document requests, many of which directly target the subjects GSN now claims require supplemental discovery in light of *Comcast Cable*. For example, GSN has already received "[a]ll documents concerning or reflecting any analysis [by Cablevision] of GSN, including, without limitation, its audience and value . . ." (GSN's First Set of Document Requests, No. 7), and "[a]ll documents comparing GSN with any Affiliated Network or any Unaffiliated Women's Network . . ." (GSN's First of Document Requests, No. 8.) In the unlikely event that these document requests did not capture relevant documents, GSN included several expansive, catch-all document requests, including one seeking "[a]ll [Cablevision] documents concerning GSN." (GSN's First Set of Document Requests, No. 1.)

[20] *See, e.g.*, Montemagno Tr. 174:22–181:6 (explaining that Cablevision, under cost pressure, decided to re-tier GSN to save annual programming fees).

C. Narrowly-Limited Supplemental Discovery is Appropriate to Update Material Already in the Record.

In light of the Presiding Judge's prior orders making clear that he will allow some supplemental discovery, Cablevision proposes that any such discovery be governed by the following guidelines:

- Any supplemental document discovery should be limited to specific and identifiable documents (such as board minutes, ratings data, and program lineups), created or relating to the period between the cutoff of document production on October 19, 2012 and December 31, 2013. Neither party should be required to collect additional emails or conduct generalized searches for documents "concerning" various topics.
- No interrogatories or requests for admissions should be permitted.
- Additional fact depositions, if any, should be limited to three (3) per side and to new issues related to the *Comcast Cable* opinion or relevant events post-dating the prior submission of written direct testimony.
- GSN should be permitted to submit a supplemental expert report from only Mr. Singer, which shall not exceed twenty-five (25) pages (including appendices). Cablevision will be permitted to submit a supplemental expert report of equal length by Mr. Orszag that responds to the new Singer report.
- Each party may conduct one additional expert deposition of Mr. Singer and Mr. Orszag, limited to the topics addressed in the new supplemental reports.

Although GSN wants an unfettered ability to initiate all of the wide-ranging new discovery that it sees fit, and proposes that Cablevision can object thereafter, Cablevision respectfully submits that the above reasonable guidelines both are more consistent with the concept of supplemental discovery and permit the Presiding Judge to manage this process more efficiently from the outset. For example, Cablevision believes that the deposition guidelines will minimize witness inconvenience and the prejudice arising from potential counsel's efforts to re-plow old ground in order to secure "better" deposition testimony. Given the obvious differences in views between the parties, this proactive approach will also reduce the number of expensive and time-consuming discovery disputes between the parties and enable the Presiding Judge to move the case to trial in the fall in an orderly manner.

Finally, Cablevision agrees with GSN on the proposed case schedule set out above.

Cablevision stands ready to discuss its proposal with the Presiding Judge at a conference after April 14, 2014 if that would be useful.

3. Enforcement Bureau

The Bureau has reviewed GSN's discovery proposal and Cablevision's response. The Bureau submits that GSN and Cablevision are in a better position to assess whether additional discovery is necessary and to what extent. The Bureau takes no position on the parties' discovery proposals.

* * *

The parties would be pleased to supply any additional information that would be helpful to the Presiding Judge in connection with such scheduling.

Respectfully submitted,

For Complainant:

/s/ Stephen A. Weiswasser
Stephen A. Weiswasser
Paul W. Schmidt Phyllis
Jones Elizabeth H. Canter
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401 (202) 662-6000

C. William Phillips
Laura Flahive Wu
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018-1405 (212) 841-1000

Counsel to Game Show Network, LLC

For the Enforcement Bureau:

/s/ Pamela Kane
Travis LeBlanc
Pamela S. Kane
William Knowles-Kellett
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

Counsel for the Enforcement Bureau

For Respondent:

/s/ Jay Cohen
Jay Cohen
Andrew G. Gordon
Gary R. Carney
George Kroup
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Tara M. Corvo
Robert G. Kidwell
Ernest C. Cooper
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.,
Suite 900
Washington, D.C. 20004
(202) 434-7300

Scott A. Rader
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
Chrysler Center
666 Third Avenue New
York, NY 10017 (212)
935-3000

Counsel to Cablevision Systems Corporation

Dated: April 10, 2014

CERTIFICATE OF SERVICE

I, Elizabeth Canter, hereby certify that on April 10, 2014, copies of the foregoing were served by electronic mail upon:

Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mary L. Gosse
Administrative Officer
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Austin K. Randazzo
Attorney-Advisor/Law Clerk
Federal Communications Commission
Office of Administrative Law Judges
445 12th Street, S.W.
Washington, D.C. 20554

William Knowles-Kellett
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Pamela Kane
Deputy Chief
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Gary Schonman
Special Counsel
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Counsel to the Enforcement Bureau

Tara M. Corvo
Robert G. Kidwell
Ernest C. Cooper
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
(202) 434-7300

Jay Cohen
Andrew G. Gordon
Gary R. Carney
George Kroup
James Borod
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Counsel to Cablevision Systems Corporation

Scott A. Rader
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
Chrysler Center
666 Third Avenue New York, NY 10017
(212) 935-3000

/s/Elizabeth Canter

Exhibit F

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 14M-13

In the Matter of	)	MB Docket No. 12-122
	)	
Game Show Network, LLC,	)	File No. CSR-8529-P
Complainant,	)	
	)	
v.	)	
	)	
Cablevision Systems Corp.,	)	
Defendant	)	
	)	
Program Carriage Complaint	)	

ORDER

Issued: April 17, 2014 **Released: April 17, 2014**

I

Game Show Network, LLC ("GSN"), Cablevision Systems Corp. ("Cablevision") (together "the discovering parties"), and the Enforcement Bureau filed their Joint Status Report on April 10, 2014. In the Report, GSN described its discovery needs, guided by the D.C. Circuit's panel decision in *Comcast Cable Communications v. FCC.*[1] There, the D.C. Circuit provided instruction as to the types of evidence that would be relevant to proving that a multichannel video programming distributor unlawfully discriminated against an independent, unaffiliated video programming vendor.[2]

GSN, the party that is assigned the burden of proof, must have full opportunity to discover evidence relevant to meeting its burden. That opportunity must include the ability to learn and benefit from the D.C. Circuit's latest guidance. Further, the Presiding Judge will not unnecessarily interfere with the general discovery strategy of a party acting in good faith. Discovery will accordingly be reopened as preliminarily scheduled by GSN.

Discovering parties must take every opportunity to cooperate with each other in working out any discovery glitches before seeking relief from the Presiding Judge. It is therefore expected that GSN will narrow its discovery efforts to seek discovery that accords with the guidance provided by the D.C. Circuit, or that updates the existing record. Cablevision will limit its

---

[1] *Comcast Cable Comme'ns, LLC v. FCC*, 717 F.3d 982, 985-87 (D.C. Cir. 2013).
[2] *See id.* at 985-87.

objections to instances where the parties have exhausted all means to mutually resolve their disagreements.

Finally, the Presiding Judge will consider tempered argument that supplementary discovery is unnecessary only where a specific objection is made to a specific discovery demand.

II

Discovery shall proceed as follows:

1. GSN may proceed with its discovery on **May 1** in accord with its proposed schedule.
2. Cablevision also may initiate its own discovery on **May 1**, which may include (but is not limited to) updating previously discovered evidence that it may seek to introduce at trial.
3. Interrogatories shall be focused on seeking specific responses, such as the identity of officers, directors, employees, consultants, corporate business documents, studies, business strategies and plans. Essay-style answers should not be invited or volunteered.
4. Discovering parties shall identify each testifying and non-testifying expert retained or employed to assist or testify on or before **June 2**.
5. Each of the discovering parties shall submit a schedule of depositions of testifying witnesses, including experts, to the Presiding Judge on or before **June 2**. Each witness that will testify must have been deposed. If practicable, a Joint Deposition schedule will be prepared.
6. Discovering parties shall submit a Joint Glossary of Terms on or before **June 30**. To the extent feasible, the discovering parties shall take particular care in defining any terminology drawn from the D.C. Circuit's decision.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION [3]

Richard L. Sippel
Chief Administrative Law Judge

[3] Courtesy copies are being sent to counsel *via* e-mail on date of issuance.

Exhibit G

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Game Show Network, LLC,	)	MB Docket No. 12-122
Complainant,	)	File No. CSR-8529-P
	)	
v.	)	
	)	
Cablevision Systems Corp.,	)	
Defendant	)	

DIRECT TESTIMONY OF THOMAS MONTEMAGNO

I, Thomas Montemagno, hereby swear and affirm as follows:

I. Background

A. Responsibilities

1. I am the Executive Vice President of Programming for Cablevision, a position I have held since October 2012. I report to Cablevision's CEO, James Dolan. I joined Cablevision more than 23 years ago after graduating from St. John's University, and have held a variety of positions within the company's programming department. Prior to becoming Executive Vice President, I was Senior Vice President of Programming Acquisition. The programming department handles acquisition of all of the content that Cablevision carries on its systems—broadcast, linear, video-on-demand, and the like. As Senior Vice President, I led these acquisition efforts, and I made recommendations for carriage and non-carriage of cable programming services.

2. In my current position, I have primary negotiating and decision-making authority for all of the content Cablevision carries on its systems. In making carriage decisions, I seek input from the video product management group. The video product management group is

DEFENDANTS EXHIBIT
CV Exh. 234

[redacted]

55. [redacted]

56. At the direction of Mr. Rutledge and Mr. Bickham, we proceeded with our plans to reposition GSN to the Sports Pak and began bill messaging for the re-tiering in early December. This is reflected in the November 2010 programming report, which is included in CV Exh. 121. The Sports Pak was the best alternative to dropping GSN altogether as repositioning GSN to iO Silver or iO Gold would not have met our goals for cost savings (and the only other tiers we offer are language based). Additionally, since we didn't have any other subject matter oriented tiers, Cablevision was considering expanding the Sports Pak to include additional entertainment and lifestyle channels during this time period. [redacted]

D. The Decision to Re-Tier GSN Was not Related at All Related to WE tv or Wedding Central.

57. I understand that GSN's central allegation in this case is that Cablevision repositioned GSN to favor its affiliated networks WE tv, and Wedding Central. GSN is wrong. I personally participated in the decision-making process, and at no time in any of our deliberations did I or anyone else consider WE tv or Wedding Central, or any potential effect—competitive or otherwise—those networks might experience from the repositioning of GSN. Moreover, I never

Exhibit H

REDACTED VERSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Game Show Network, LLC,	)	MB Docket No. 12-122
Complainant,	)	File No. CSR-8529-P
	)	
v.	)	
	)	
Cablevision Systems Corp.,	)	
Defendant	)	

HEARING DESIGNATION ORDER and

NOTICE OF OPPORTUNITY FOR HEARING FOR FORFEITURE

Adopted: May 9, 2012 **Released: May 9, 2012**

By the Chief, Media Bureau:

I. INTRODUCTION

1. By this *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("*Order*"), the Chief, Media Bureau ("Bureau"), pursuant to delegated authority,[1] hereby designates for hearing before an Administrative Law Judge ("ALJ") the above-captioned program carriage complaint filed by Game Show Network, LLC ("GSN") against Cablevision Systems Corporation ("Cablevision"). The complaint alleges that Cablevision, a vertically integrated multichannel video programming distributor ("MVPD"), discriminated against GSN, a video programming vendor, on the basis of affiliation, with the effect of unreasonably restraining GSN's ability to compete fairly, in violation of Section 616(a)(3) of the Communications Act of 1934, as amended ("the Act"), and Section 76.1301(c) of the Commission's Rules.[2] The complaint arises from Cablevision's decision to move GSN from a basic tier to a premium sports tier, resulting in a loss of Cablevision subscribers for GSN.[3]

2. After reviewing GSN's complaint, we find that GSN has put forth sufficient evidence supporting the elements of its program carriage discrimination claim to establish a *prima facie* case. Below, we review the evidence from GSN's complaint establishing a *prima facie* case.[4] While we rule on

---

[1] *See* 47 C.F.R. § 0.61.

[2] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[3] *See* Game Show Network, LLC, Program Carriage Complaint, File No. CSR-8529-P (filed Oct. 12, 2011), at ¶ 2 ("*GSN Complaint*").

[4] *See The Tennis Channel Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149, 14149-50, ¶ 2 n.3 (MB 2010) ("*Tennis Channel HDO*"), *application for review pending*; *see also Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 26 FCC Rcd 11494, 11506, ¶ 17 (2011) ("We also clarify that the Media Bureau's determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only. If the Media Bureau determines that the complainant has established a *prima facie* case, the Media Bureau will then review the answer (including any attachments) and reply to determine whether there are procedural defenses that might warrant dismissal of the case

REDACTED VERSION

34. *Impaired ability to secure distribution agreements.* In his declaration, GSN's expert, Dr. Singer, states that vertically integrated cable operators other than Cablevision currently carry both GSN and WE tv on highly penetrated tiers and that these cable operators monitor Cablevision's carriage decisions.[184] Thus, according to Dr. Singer, Cablevision's decision to reposition GSN likely has a negative influence on the decisions of other cable operators with respect to carriage of GSN.[185]

2. Direct Evidence

35. In addition to circumstantial evidence, GSN also provides what it claims to be direct evidence of discrimination "on the basis of affiliation or nonaffiliation."[186] Specifically, GSN provides a declaration from Derek Chang, Executive Vice President of Content Strategy and Development at DIRECTV and representative of DIRECTV on GSN's board of directors, setting forth the following facts regarding carriage negotiations with Cablevision.[187] On December 3, 2010, Cablevision notified GSN that Cablevision would reposition GSN to a sports tier effective February 1, 2011.[188] After receiving this notification, GSN's CEO asked Mr. Chang to contact Cablevision's Chief Operating Officer ("COO") to persuade Cablevision to reconsider.[189] In response to Mr. Chang's inquiry, Cablevision's COO asked Mr. Chang to speak with Josh Sapan, President and COO of Cablevision's programming subsidiary, Rainbow Media Holdings ("Rainbow").[190] Mr. Chang states that, during his conversations with Mr. Sapan and other Rainbow staff, "it was made clear to me that Cablevision would consider continuing GSN's broad distribution on Cablevision's systems if DIRECTV would consider giving distribution to Cablevision's new service, Wedding Central."[191] Mr. Chang declined because DIRECTV had previously decided that Wedding Central did not merit distribution on DIRECTV.[192]

3. Conclusion

36. Based on the foregoing, we find it appropriate to designate the captioned complaint on the issues specified below for a hearing before an ALJ.[193] While we question whether GSN's alleged direct evidence of discrimination, standing alone, is sufficient to establish a *prima facie* case, we need not address this issue because GSN has put forth sufficient circumstantial evidence of discrimination "on the basis of affiliation or nonaffiliation" to warrant referral of this matter to an ALJ. We emphasize that our determination that GSN has offered sufficient evidence on each required element to meet the threshold for establishing a *prima facie* case does not mean that we have found each evidentiary proffer set forth above

---

[184] *See* Singer Decl. at ¶¶ 6, 49.

[185] *See id.*

[186] *See GSN Complaint* at ¶¶ 52-53; Chang Decl. at ¶¶ 3-7; *see also supra* ¶ 10 (discussing requirements for establishing a *prima facie* case based on direct evidence of affiliation-based discrimination).

[187] *See* Chang Decl. at ¶ 1. As discussed above, DIRECTV has an ownership interest in GSN. *See supra* n.25.

[188] *See* Chang Decl. at ¶ 3; *see also GSN Complaint* at ¶ 25.

[189] *See* Chang Decl. at ¶ 4; *see also GSN Complaint* at ¶ 26; Goldhill Decl. at ¶ 12.

[190] *See* Chang Decl. at ¶ 5; *see also GSN Complaint* at ¶ 26.

[191] Chang Decl. at ¶ 6; *see also GSN Complaint* at ¶ 27; Goldhill Decl. at ¶ 13.

[192] *See* Chang Decl. at ¶ 6; *see also GSN Complaint* at ¶ 27.

[193] The question of whether GSN has put forth evidence sufficient to warrant designation of this matter for hearing is not an issue before the Presiding Judge. As required by the Commission's Rules, to the extent Cablevision seeks Commission review of our decision on this issue, such review, if any, shall be deferred until exceptions to the Initial Decision in this proceeding are filed. *See* 47 C.F.R. § 1.115(e)(3).

necessarily persuasive, nor have we weighed GSN's evidence in light of rebuttal evidence offered by Cablevision. At hearing, the ALJ will be able to fully weigh all evidence offered by the parties.

C. Referral to ALJ or ADR

37. Pursuant to Section 76.7(g)(2) of the Commission's Rules, each party will have ten days following release of this *Order* to notify the Chief, Enforcement Bureau and Chief ALJ, in writing, of its election to resolve this dispute through ADR. The hearing proceeding will be suspended during this ten-day period. In the event that both parties elect ADR, the hearing proceeding will remain suspended, and the parties shall update the Chief, Enforcement Bureau and Chief ALJ on the first of each month, in writing, on the status of the ADR process. If both parties elect ADR but fail to reach a settlement, the parties shall promptly notify the Chief, Enforcement Bureau and Chief ALJ in writing, and the proceeding before the ALJ will commence upon the receipt of such notification. If both parties elect ADR and reach a settlement, the parties shall promptly notify the Chief, Enforcement Bureau, Chief ALJ, and Chief, Media Bureau in writing, and the hearing designation will be terminated upon the Media Bureau's order dismissing the complaint becoming a final order. If only one party elects ADR and the other elects to proceed with an adjudicatory hearing, then the hearing proceeding will commence the day after the ten-day period has lapsed.

38. Notwithstanding our determination that GSN has made out a *prima facie* case of program carriage discrimination by Cablevision, we direct the Presiding Judge to develop a full and complete record in the instant hearing proceeding and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision on each of the outstanding factual and legal issues. In addition, we direct the Presiding Judge to make all reasonable efforts to issue his Initial Decision on an expedited basis.[194] In furtherance of this goal, the Presiding Judge may consider placing limitations on the extent of discovery to which the parties may avail themselves.

IV. ORDERING CLAUSES

39. Accordingly, **IT IS ORDERED**, that pursuant to Section 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 409(a), and Sections 76.7(g) and 1.221 of the Commission's Rules, 47 C.F.R. §§ 76.7(g), 1.221, the captioned program carriage complaint filed by Game Show Network, LLC against Cablevision Systems Corporation is **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge upon the following issues:

> (a) To determine whether Cablevision has engaged in conduct the effect of which is to unreasonably restrain the ability of GSN to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by GSN, in violation of Section 616(a)(3) of the Act and/or Section 76.1301(c) of the Commission's Rules; and
>
> (b) In light of the evidence adduced pursuant to the foregoing issue, to determine whether Cablevision should be required to carry GSN on its cable systems on a specific

[194] In the *2011 Program Carriage Order*, the Commission adopted a rule directing the ALJ to release an initial decision within 240 calendar days after one of the parties informs the Chief ALJ that it elects not to pursue ADR or, if the parties have mutually elected to pursue ADR, within 240 calendar days after the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR. *See 2011 Program Carriage Order*, 26 FCC Rcd at 11509-10, ¶ 21; *see also* 47 C.F.R. § 0.341(f). While this rule does not apply to this complaint (*see supra* n.7), we encourage the ALJ to make all reasonable efforts to comply with this deadline. Pursuant to Section 76.10(c)(2) of the Commission's Rules, a party aggrieved by the ALJ's decision on the merits may appeal such decision directly to the Commission in accordance with Sections 1.276(a) and 1.277(a) through (c) of the Commission's Rules. 47 C.F.R. § 76.10(c)(2).